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No. 01-1325

IN THE

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, and L. DIAN MAXWELL,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

In *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998), the Court held that the interest on clients' funds held in so-called IOLTA accounts ("Interest on Lawyers' Trust Accounts") was the property of the clients. This case presents two questions:

1. Whether the regulatory scheme for funding state legal services by systematically seizing this property violates the Takings Clause of the Fifth Amendment to the Constitution so that the property owners are entitled to relief.

2. Whether injunctive relief is available to enjoin a State from committing such a violation of the Takings Clause, where the legislative scheme in issue clearly contemplates that no compensation would be paid to the owners of the interest taken, and where the small amount due in any individual case often renders recovery through litigation impractical.

PARTIES TO THE PROCEEDING

Aside from the parties named in the caption, the following were Defendants/Appellees in the court of appeals: Kevin Kelly, Bradley C. Diggs, Dwight S. Williams, the Honorable Gregory J. Tripp, and the Honorable Cynthia Imbrogno, in their official capacities as Presidents of the Legal Foundation of Washington; and Barbara Durham, James M. Dolliver, Richard P. Guy, and Philip A. Talmadge, in their official capacities as Justices of the Supreme Court of Washington. Those nine individuals no longer serve in the capacities listed and thus are no longer parties to this proceeding.

Petitioner Washington Legal Foundation is a nonstock corporation; it has no parent corporation, and no publicly held company owns any of its stock.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. 1a-51a) is reported at 271 F.3d 835. The opinion of the court of appeals panel that initially heard this case (Pet. App. 52a-85a) is reported at 236 F.3d 1097. The opinion of the district court granting Respondents' motions for summary judgment and denying Petitioners' motion for summary judgment (Pet. App. 86a-96a) is not reported. The order granting *en banc* review (App. 97a) is reported at 248 F.3d 1201.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2001. On February 8, 2002, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 7, 2002. The petition for a writ of certiorari was filed on March 7, 2002, and was granted on June 10, 2002. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The relevant provisions of the Fifth Amendment to the Constitution and of the Washington State Admissions to Practice Rules and Rules of Professional Conduct are set forth in the Appendix to the Petition. Pet. App. 98a-108a.

STATEMENT OF THE CASE

This case challenges the constitutionality of the Washington State IOLTA ("Interest on Lawyers Trust Accounts") program. Under that program, funds belonging to certain individuals hiring lawyers and real estate professionals in Washington are used -- without the consent and usually without the knowledge of those individuals -- to finance a variety of legal services programs. The U.S. Court of Appeals for the Ninth Circuit, in a 7-4 *en banc* decision, held that the IOLTA program does not violate the rights of Petitioners Allen D. Brown and Greg Hayes under the Takings Clause of the Fifth Amendment. The appeals court further held that the other Petitioners lacked standing to challenge the IOLTA program because they sought only injunctive relief and, the court held, injunctive relief is not a permissible remedy for a Takings Clause violation of the sort alleged in this case.

The IOLTA Program. By an order dated June 19, 1984, the Supreme Court of Washington created the Washington IOLTA program. 101 Wn.2d 1242 (1984), Joint Appendix ("JA") 148. Pursuant to that order, the court incorporated and established Respondent Legal Foundation of Washington ("LFofW") as a nonprofit corporation, with Articles of Incorporation and Bylaws promulgated by the Court. The order also amended Disciplinary Rule ("DR") 9-102 of the Washington Code of Professional Responsibility ("CPR"), which imposed obligations on Washington attorneys regarding "Preserving Identity of Funds and Property of a Client." The amendment provided that an attorney receiving client funds that were "nominal in amount" or were "expected

to be held for a short period of time" must create an unsegregated interest-bearing account (an "IOLTA account") and direct the depository institution to pay interest earned on the account to the LFofW. CPR DR 9-102(C)(1) and (4). The amendment further provided that all client funds were to be placed into the IOLTA account unless they were deposited in another interest-bearing account that resulted in the creation of "a positive net return for the client" (defined as interest paid on the account less maintenance costs and the costs of accounting for the interest). DR 9-102(C)(3). The court subsequently replaced the Code of Professional Responsibility with the Rules of Professional Conduct ("RPC"); the provisions of CPR DR 9-102 were incorporated into RPC 1.14.[1]

Both before and after 1983, many real estate transactions in Washington have been consummated by escrow companies and title insurance companies, without the assistance of attorneys. In those cases, legal documents used to complete the transactions have been selected by trained laypersons familiar with the legal requirements of such transactions. In the early 1980s, the Supreme Court of Washington ruled that such laypersons were engaged in the unauthorized practice of law. *Bennion, Van Camp, Hagan & Ruhl v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 635 P.2d 730 (1981). That decision was controversial among some members of the state legislature, who argued that the court had exceeded its constitutional bounds by attempting to regulate a field theretofore regulated by the legislature. The court attempted to settle the controversy in 1983 by adopting

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[1] A copy of the most recent version of RPC 1.14 is set forth at Pet. App. 99a-102a.

Admission to Practice Rule ("APR") 12. APR 12 established a procedure whereby nonlawyers could be licensed to select appropriate legal documents for use in real estate settlements. APR 12 established a Limited Practice Board with the responsibility for licensing such LPOs (Limited Practice Officers, also known as Certified Closing Officers).

On September 21, 1995, the Supreme Court of Washington adopted a new APR 12(h) and 12.1 in order to make LPOs subject to the IOLTA program. APR 12(h) and 12.1 make clear that LPOs' obligations to maintain and use IOLTA accounts are identical to attorneys' IOLTA obligations.[2] APR 12(h) provides that LPOs must comply with APR 12.1. APR 12.1 in turn provides that all funds received in connection with a transaction being closed by an LPO must be placed in an interest-bearing account. The interest-bearing account must be an IOLTA account (with interest payable to the LFofW), except that the funds may be placed in a non-IOLTA interest-bearing account if and only if doing so results in the creation of "a positive net return for the client" (defined as interest paid on the account less maintenance costs and the costs of accounting for the interest). APR 12.1(c)(2) and (3).

Since IOLTA's inception in 1985, interest generated by Washington IOLTA accounts has generally amounted to between $2.5 and $4.0 million per year. Pet. App. 7a. LFofW is authorized under its Articles of Incorporation to award grants to § 501(c)(3) corporations, the only limitation

[2] Copies of APR 12(h) and 12.1 are set forth at Pet. App. 103a-108a.

on grants being that they must be for the purpose of providing legal services and education to the public in civil law matters.

The Escrow Industry. The escrow and title insurance industries provide escrow services in Washington to buyers and sellers in connection with real estate transactions. Those services include holding customer funds in escrow accounts for a short period of time while the transactions are being completed.

Historically, escrow companies and title companies have placed customer trust funds into non-interest-bearing checking accounts. The accounts were non-interest-bearing because federal law (since the Depression) has prohibited federally-insured banks and savings and loans from paying interest on *checking* accounts. *See* 12 U.S.C. §§ 371a, 1464(b)(1)(B), 1828(g). *See also* Declaration of Gerald R. Wheeler ¶ 5, Pet. App. 110a.[3] Federal restrictions on interest payments by financial institutions have been relaxed somewhat since 1980, so that banks are now authorized to offer Negotiable Order of Withdrawal (NOW) accounts, which operate like traditional checking accounts yet are not considered "demand" accounts and thus are permitted to pay interest. 12 U.S.C. § 1832. For a variety of reasons, however, including federal restrictions on the use of NOW accounts by for-profit corporations and the inconvenience of subaccounting for interest earned by multiple depositors, escrow and title companies have generally declined to deposit escrow funds in

[3] The Wheeler Declaration, set forth at Pet. App. 109a-112a, was attached to the motion for summary judgment filed by Petitioners in the district court.

interest-bearing accounts. 12 U.S.C. § 1832(a)(2); Pet. App. 110a.

Although banks have not paid interest on escrow accounts, in lieu thereof they have provided what are referred to in the industry as "earnings credits." *Id.* 111a. These credits can generally be applied against fees that would otherwise be payable to the bank for a wide variety of services rendered by the bank. *Id.* Such credits directly reduce costs to customers for services, including escrow trust accounting services and wire transfers. *Id.*

The adoption of APR 12(h) and 12.1 has significantly altered that historical practice. APR 12.1 provides that all funds received in connection with a transaction being closed by an LPO must be placed in an interest-bearing account; as a practical matter, that requires placing the funds into an IOLTA account with interest payable to LFofW. Following the adoption of APR 12(h) and 12.1, many Washington banks have been unwilling to offer earnings credits on escrow accounts. In the absence of such credits, bank customers are now paying for many services that formerly were "free" (in the sense that earnings credits generally were more than sufficient to offset charges for such services). Pet. App. 111a. Some or all of those costs inevitably are passed along by escrow and title companies to their customers. *Id.* 112a. Some escrow companies have taken to including those bank charges as a separate item on closing statements. *Id.* Others simply include the bank charges as part of general overhead costs; since overhead costs are a major factor in determining a company's pricing structure, the bank charges ultimately are borne in whole or in part by escrow customers. *Id.*

The Petitioners. Petitioners Allen D. Brown and Greg Hayes regularly purchase and sell real estate as part of their business dealings. In connection with recent real estate transactions, they have placed their funds in the custody of their escrow companies, and those companies (without the consent of Petitioners) deposited the funds into IOLTA accounts. Pet. App. 14a. At the direction of the companies, interest earned on those funds was forwarded by the depository banks to Respondent LFofW. JA 49, 51. Both Brown and Hayes expect to continue to purchase and sell real estate located in the State of Washington. JA 53, 54.

Petitioner Dennis H. Daugs owns and operates a small escrow company in Federal Way, Washington. He regularly holds client funds entrusted to him in connection with real estate transactions. Pet. App. 15a. As a licensed LPO, he is subject to APR 12.1. Mr. Daugs has determined, however, that compliance with APR 12.1 and payment to LFofW of interest income belonging to his clients would violate his fiduciary obligations to his clients to protect their property. Accordingly, he has refused to participate in the IOLTA program, thereby exposing himself to potential disciplinary action. JA 57.

Petitioner L. Dian Maxwell is employed by Pacific Northwest Title Company of Washington ("PNW Title"), which provides escrow services in connection with real estate closings. Up until 1996, Ms. Maxwell was a licensed LPO. After Rule 12.1 was adopted, PNW Title determined that it could avoid being subject to the IOLTA program (and thus could save the estimated $50 per transaction cost of participating in the IOLTA program) by requiring all of its employees involved in real estate closings to surrender their

LPO licenses. JA 59; Pet. App. 16a.[4] In order to keep her job, Ms. Maxwell surrendered her license. *Id.*

Petitioner Washington Legal Foundation ("WLF") is a public interest law firm whose members include several of the other Petitioners, as well as Washington citizens similarly situated to the other Petitioners.

Proceedings Below. Petitioners filed this action in January 1997 in U.S. District Court for the Western District of Washington, alleging that the IOLTA program violated their rights under the First and Fifth Amendments. Named as defendants were LFofW, its President, and the nine justices of the Supreme Court of Washington -- sued in their official capacities only.

In January 1998, the district court issued an Order and Judgment granting Respondents' motions for summary judgment and denying Petitioners' motion for summary judgment. Pet. App. 86a-96a. The district court stated that the existence of a property right in IOLTA interest was "a prerequisite to establishing either a First or Fifth Amendment claim." *Id.* 92a. The court held that Petitioners lacked any property rights in the IOLTA interest and, accordingly, dismissed their constitutional claims. *Id.* 94a. The court also rejected Petitioners' alternative claim that the IOLTA program violated their Fifth Amendment rights by failing to compensate them for the use of their funds. *Id.* 96a.

[4] Because PNW Title no longer employs LPOs, its customers now must employ outside counsel to prepare the form legal documents used in connection with real estate transactions. JA 59.

In January 2001, a Ninth Circuit panel reversed.[5] Pet. App. 52a-85a. The panel determined that the interest income in IOLTA accounts belongs to those whose funds generated the income, and that "a government appropriation of that interest for a public purpose is a taking entitling them to just compensation under the Fifth Amendment." App. 85a. The panel remanded the case to the district court for determination of an appropriate remedy. *Id.* Rejecting Respondents' argument that the IOLTA program could be upheld under the *ad hoc* approach to Takings Clause claims articulated in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), the panel stated, "When the government permanently appropriates all of the interest on IOLTA trust funds, that is a *per se* taking, as when it permanently appropriates by physical invasion of real property." Pet. App. 77a (citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992)). The panel rejected Respondents' argument that the Takings Clause provides greater protection against government interference with real property rights than against government expropriation of intangible personal property. The panel stated, "This [argument] would imply the nonsensical proposition that a taking would *less* readily be found if a state entirely confiscated people's money from their bank accounts or IRA's than if it installed a sign on their land." Pet. App. 74a.

[5] While the appeal was pending, this Court issued its decision in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). *Phillips* held, in a case involving the Texas IOLTA program, that interest earned on IOLTA accounts belongs to those whose funds generated the interest.

On May 9, 2001, the Ninth Circuit granted Respondents' petition for rehearing *en banc* and vacated the panel decision. *Id.* 97a. On November 14, 2001, the *en banc* appeals court voted 7-4 to affirm the district court in part, vacate in part, and remand. *Id.* 1a-45a. Initially, the court *sua sponte* addressed Petitioners' standing. The court held that Respondents had confiscated funds belonging to Petitioners Brown and Hayes and thus that those two Petitioners had standing to challenge the IOLTA program. *Id.* 14a.

The court also held that Petitioners Daugs, Maxwell, and WLF lacked standing because Washington had not confiscated any property belonging to them, and thus they had no basis for claiming compensation. App. 15a-19a. Those Petitioners had never, in fact, sought compensatory relief; rather, they had sought injunctive relief. The court's apparent confusion on this point ended up having no effect on its ultimate disposition of their claims, however, because the court held that the injunctive relief sought by Petitioners Daugs, Maxwell, and WLF is not available in Takings Clause cases: "[T]he remedy for the Fifth Amendment violation alleged here is to provide the property owner with just compensation, if a taking has occurred." *Id.* 19a.

Turning to the merits, the court held that Petitioners Brown and Hayes were, indeed, the owners of the interest earned on their IOLTA funds, and it vacated the district court's holding to the contrary. The court rejected Respondents' efforts to distinguish *Phillips*, holding that any differences between Texas and Washington property law with respect to ownership of interest income were "immaterial." *Id.* 24a. The court nonetheless held that Respondents'

confiscation of Petitioners' property did not violate the Takings Clause. First, the court concluded that Petitioners' Takings Clause claims should be judged under the *ad hoc* method of analysis outlined in *Penn Central* rather than the *per se* analysis outlined in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Pet. App. 27a-32a. The court said, "The *per se* analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money." *Id.* 27a. The court thought that application of the *ad hoc Penn Central* approach was especially appropriate in this case because: (1) the property being confiscated from Petitioners was being used to promote the common good, *id.* 29a; and (2) "Given the highly-regulated nature of the banking industry, individuals should expect that their commercial transactions, including their bank deposits, will be regulated." *Id.* 31a.

The court noted that courts applying an *ad hoc* analysis often look to three factors in determining whether a taking has occurred: (1) the economic impact of the government's action; (2) the extent of interference with investment-backed expectations; and (3) the character of the governmental action. App. 32a. Applying those factors, the court concluded that the expropriation of Petitioners' property did not violate the Takings Clause because: (1) the expropriation had no economic impact on Petitioners Brown and Hayes since the expropriated interest would not have come into existence but for the IOLTA program and they had not proven that they were affected by the loss of "earnings credits" on the escrow accounts, *id.* 33a-38a; (2) the expropriation did not interfere with their "investment-backed expectations" since they could not have expected to earn interest on their funds in the

absence of IOLTA, *id.* 38a-39a; and (3) the "character of the government action" could best be "viewed as a regulation of the uses of Brown's and Hayes's property consisting of the principal and the accrued interest in aggregation," not as a confiscation of 100% of the interest income. *Id.* 39a. The court concluded, in light of the highly regulated nature of banking transactions and the ethical obligations of lawyers and LPOs to assist in providing legal services to the indigent, "the IOLTA regulations are not out of character for either the commercial industry or the professions they affect." *Id.* 40a.

Applying the same analysis that led it to conclude that no taking had occurred, the court went on to find, in the alternative, "We . . . hold that even if the IOLTA program constituted a taking of Brown's and Hayes's private property, there would be no Fifth Amendment violation because the value of their just compensation is nil." *Id.* 45a.

The court recognized that by vacating the district court's holding that Petitioners lacked property rights in the IOLTA interest, it had revived Petitioners' First Amendment claims. Rather than addressing the merits of those claims, the court remanded them for initial consideration in the district court. *Id.*

Judge Kozinski dissented, joined by Judges Trott, Kleinfeld, and Silverman. *Id.* 45a-51a. Judge Kozinski argued that this Court's *Phillips* decision required application of *per se* takings analysis to the expropriation of Petitioners' property; he asserted, "*Penn Central*'s *ad hoc* approach deals with regulatory takings -- a difficult and vexing corner of takings law." *Id.* 48a. He endorsed the panel's conclusion that Respondents' actions constituted a compensable taking of

Petitioners' property, stating, "[I]t . . . strikes me as peculiar and quite dangerous to say that the government has greater latitude when it takes money than when it takes other kinds of property." *Id.* 50a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Takings Clause applies in its core application to outright appropriations by the government of a person's property. That is exactly what we have here. Last Term, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002), this Court explained that the regulatory takings cases were not a limitation of the traditional, core meaning of the Takings Clause but its extension to cases where rather than simply seizing the property, the government limits the uses to which the owner can put it, in order to advance some regulatory objective. In such cases, regulation may go "too far" and amount to an appropriation that must be compensated. It is to adjudicate claims of the latter sort that the Court has developed the *ad hoc*, multi-factor *Penn Central* analysis:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.

Tahoe-Sierra, 122 S. Ct. at 1479.

The court below seizes on the single word "physical" in this explanation and similar Court decisions, as if that explanation only applied to tangible property, while money -- the court below keeps insisting -- is fungible. But this misses the whole point of what the Court was getting at. What is at issue is not the nature of the property that was taken, but the character of the government's action. Was it "regulating" in a manner that incidentally limited the uses to which property may be put, or was it simply acquiring the property for government use? Only in the former case is an *ad hoc* analysis appropriate. Here it is captious to say that the IOLTA program limits or "prohibit[s] private uses" of the clients' property. It is simply seizing the interest for a public purpose.

The court below waxes eloquent about how "the availability of interest through the establishment of NOW accounts provided a unique opportunity for the legal profession to further two of its most important ethical obligations -- ensuring that all individuals, regardless of their financial circumstances, have access to the judicial system and segregating client trust funds from the lawyers' own accounts -- without imposing additional societal costs." Pet. App. 6a. What the court failed to explain is why it was appropriate to take *clients'* property in order to further the ethical obligations of their lawyers. Respondents' answer to that question appears to be that this confiscation of the whole of the clients' interest can be justified as regulation. "The IOLTA rules are better viewed as a regulation of the uses of [Petitioners'] property . . . . Banking is a heavily regulated industry . . . . Moreover, the ability to practice a profession -- and the conduct expected of those who do -- is also heavily regulated." Pet. App. 39a. But this ignores the fact (among

others) that it is not the lawyers' or the banks' funds that are confiscated by IOLTA. What we have is a pastiche of familiar phrases found in takings cases without any regard to the circumstances to which they are applied.

The court below congratulates as "prescient" the dissenting opinion's criticism in *Phillips* of this Court's analysis as "skewing the resolution of the taking and compensation issues that will follow." Pet. App. at 10a (quoting *Phillips*, 524 U.S. at 178 (Souter, J., dissenting)). In the eyes of the dissenting justices, the majority's recognition of the plaintiffs' "abstract property right to interest 'actually earned'" on his principal -- severed from the inextricable questions whether a taking occurred and, if so, whether compensation is due -- skewed the Fifth Amendment analysis. *Id.* We agree that *Phillips* largely disposes of the remaining questions in this case, but unlike the court below we accept as a premise what this Court has already said: that the interest in IOLTA accounts *is* the property of the clients. *Phillips*'s analysis inevitably demands that, in this case, we ask the next question: Was that property taken? Those who defend the IOLTA program work mightily to keep that question at bay because, as Justice Souter appears to have recognized, the simple and obvious answer is that it was taken outright, with no regulatory purpose of any sort.

The Court's *per se*, or categorical, takings doctrine recognizes that certain government actions so obviously invade core property rights, thereby shifting public burdens to selected individuals, that no combination of surrounding circumstances can possibly redeem them. Thus, the Court has held that where the government commands a permanent physical invasion of a person's property, or so restricts the

use of the property as to deny it essentially all value, a constitutional taking is made out, without further consideration of related facts such as the economic effects on the owner or any beneficial purpose that the government expects to advance.

The same rationale -- that the character of the governmental action alone demonstrates beyond all doubt that a constitutional taking is being committed -- should lead the Court to hold the Washington IOLTA program to be a *per se* taking. The IOLTA program involves no regulatory purpose of any sort. It simply sets out to raise large sums of money for governmental objectives by singling out the property of certain individuals -- the interest earned on funds deposited by them with real estate professionals in connection with real estate transactions. The individuals thus singled out have no particular connection to the provision of legal services. The only reason that they are required to bear these burdens is that they are within the reach of the bar's disciplinary rules and are unlikely to make a fuss about the small sums being appropriated. This Court ruled in *Phillips* that such interest is the property of the client who owns the principal. It is further clear that no justification has been or can be offered for forcing these isolated individuals to bear the burden of supporting the legal services program which the IOLTA funds go to support. Because the IOLTA program -- which is neither a tax nor a user fee -- is an outright and highly selective seizure of property for governmental purposes, it constitutes a taking whatever other surrounding circumstances may exist.

Because there is only one Takings Clause, and because the *per se* test truncates the fuller *Penn Central* analysis of all

surrounding factors only where those factors cannot possibly alter the conclusion that a taking has occurred, a fuller consideration of the *Penn Central* factors necessarily leads to the same conclusion. The economic impact of the program is to appropriate for government use all the interest belonging to the client, in whatever amount it is earned. The client's reasonable expectation, of course, is that the government will not thus take his money arbitrarily. Respondents' principal answer throughout this litigation has been that the confiscation is permissible because the IOLTA program is responsible for generating this interest in the first place. Not only is the factual basis for this justification substantially disputed on the facts in the record, but the justification itself has already been rejected by this Court in previous cases, including *Phillips*. Plainly the interest at issue here is the property of the clients, and the government does not gain the right to take private property arbitrarily simply because it may have facilitated the creation of that property in some way.

Having established that Respondents have violated the Takings Clause, Petitioners are entitled to a remedy. The money taken from Petitioners has a readily ascertainable value; *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 (1980), mandates that the "just compensation" due is precisely equal to that value. But even if that were not so, there is no basis for denying Petitioners a remedy on the ground that the value of the property taken is not easily quantifiable. Such property rights as the right to exclude others from the use of one's money clearly have *some* value, and the uncompensated taking of those rights amounts to a violation of the Takings Clause.

The Ninth Circuit also held that under no circumstances should Petitioners be awarded equitable relief on their Takings Clause claims. That holding is directly contrary to this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which found that equitable relief is generally available in Takings Clause cases in which the appropriated property is money. When the appropriated property is money, the Court determined that parties should not be forced to endure an "utterly pointless" procedure whereby a property owner must forgo judicial remedies until after his money has been appropriated, and only then sue to require that the money be returned. *Eastern Enterprises*, 524 U.S. at 521 (plurality opinion).

ARGUMENT

I. THE IOLTA PROGRAM VIOLATES PETITIONERS' FIFTH AMENDMENT RIGHTS BY TAKING THEIR PROPERTY WITHOUT JUST COMPENSATION

The Fifth Amendment forbids the taking of private property for public use without just compensation. The purpose of this bar is to prevent the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central*, 438 U.S. at 123-124 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The Washington State IOLTA program seizes the property of individuals who happen to deposit funds with some real estate professionals or lawyers, and uses that property to fund a general governmental program. Those individuals have no clearer connection to that program than the public at large

which uses and benefits from the legal system. Thus the IOLTA program does exactly what the Takings Clause was intended to prevent. Because its purpose is simply to raise revenue, and not the regulation of conduct, it is plainly unconstitutional. No rational justification has been offered or can be imagined for why these particular individuals should be singled out to bear this public burden.

A. This Court's *Per Se* Takings Test Recognizes That Certain Government Actions So Obviously Invade Core Property Rights, Thereby Shifting Public Burdens to Selected Private Individuals, that No Combination of Surrounding Facts and Circumstances Can Possibly Redeem Them

At the core of the Fifth Amendment's admonition is the prohibition against outright seizures of property. To early constitutional theorists, the prohibitions of the Takings Clause focused on direct appropriations of property, and did not embrace governmental regulation at all. *Lucas*, 505 U.S. at 1028 n.15. As late as the end of the 19th century, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a 'practical ouster of [the owner's] possession,' *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879)." *Lucas*, 505 U.S. at 1014. Still today, as the Court recognized last Term, "[w]hen government condemns or physically appropriates property, the fact of taking is typically obvious and undisputed." *Tahoe-Sierra*, 122 S. Ct. at 1478 n.17. What we have in this case is a direct appropriation of the Petitioners' money.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court went beyond this core prohibition and recognized for the first time that "if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." *Lucas*, 505 U.S. at 1004 (citing *Pennsylvania Coal*, 260 U.S. at 414-415). In that case, Justice Holmes recognized that absent such a limitation on the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id.* at 415. Thus, he concluded, that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*

This Court in *Penn Central* identified three factors to serve as guides for evaluating regulatory takings claims:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action.

438 U.S. at 124 (citation omitted). It is clear that these *Penn Central* factors are not exclusive. Rather, they are "important guideposts," *Palazzolo v. Rhode Island,* 533 U.S. 606, 634 (2001) (O'Connor, J., concurring), directing "inquiry into all of the relevant circumstances in particular cases." *Tahoe-Sierra*, 122 S. Ct. at 1485.

The recognition of regulatory takings created the need to distinguish between outright appropriations, where a "clear rule" requiring compensation in all cases is appropriate, and takings that arise from regulatory burdens involving no direct confiscation, which situation "necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Tahoe-Sierra*, 122 S. Ct. at 1479 (quoting *Yee v. Escondido*, 503 U.S. 519, 523 (1992)). *See also Loretto,* 458 U.S. at 440; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 n.18 (1987). In addition to the undisputed need for compensation resulting from literal appropriations -- such as the exercise of eminent domain -- this Court has recognized that the "clear rule" applies in other contexts, including certain governmental actions that are tantamount to an appropriation. In two instances, in particular -- involving permanent physical occupations and regulations that deprive property of essentially all value -- the Court has held, based on review of its own prior cases, that "the character of the government action . . . is determinative" that a taking has occurred. *Loretto*, 458 U.S. at 426; *Lucas*, 505 U.S. 1003. In these instances of *per se*, or categorical takings, the conclusion follows simply from what the government has done, without regard to the injured party's "investment-backed expectations, the actual impact of the regulation on any individual, [or] the importance of the public interest served by the regulation . . . ." *Tahoe-Sierra*, 122 S. Ct. at 1477-78; *see Lucas*, 505 U.S. at 1015.

By distinguishing between cases in which the "clear rule" applies and those determinable only on a broader evaluation of all circumstances, using the *Penn Central* factors, the Court has not created two distinct Takings

prohibitions. There is only one Takings Clause. Rather, in recognizing the existence of *per se* takings, the Court has truncated as unnecessary the *ad hoc* evaluation of all the surrounding facts, in certain instances where the character of the government's action is such that it must be regarded as either an outright appropriation or its "practical equivalent." *Lucas*, 505 U.S. at 1019. Consideration of the *Penn Central* factors is irrelevant in such a case because, by its nature, the conduct amounts to a taking regardless of the interest the government is seeking to advance, or of any other facts that might emerge upon consideration of all of the circumstances. *See Loretto*, 458 U.S. at 426-27; *Lucas*, 505 U.S. at 1015.

B. This Court Should Hold That the Washington IOLTA Program is a *Per Se* Taking Because It is a Simple Appropriation of Property From a Small Number of Individuals to Fund a Government Program of General Application, and No Rationale Has Been or Can Be Offered for Singling Out Those Individuals to Bear that Burden

Washington State's IOLTA program perpetrates an obvious and undisputed taking in violation of the Fifth Amendment. In support of a laudable public goal -- the funding of legal services for those unable to afford them -- it imposes its burden capriciously on some[6] of those who happen to advance funds in connection with real estate transactions or legal services, but on no one else. We know

[6] Indeed, the IOLTA program does not even impose this burden evenly on all of those who place monies on deposit, since large deposits may be placed in a separate account with the interest credited to the client.

from this Court's decision in *Phillips* that the interest seized is the property of the principal holders. We know also that such interest is appropriated outright, and that no explanation has ever been -- or can be -- offered why this haphazardly selected group of real estate or legal clients should bear the public burden of funding indigent legal services, except perhaps the wholly unacceptable explanation that these property owners are unlikely to object in a strenuous or organized way.[7]

We know further that the IOLTA program, unlike zoning or land-use regulations, is not about regulation of private conduct or exercise of the State's police powers, where consideration of the State's legitimate purposes and

[7] It has been observed that a central concern of the Takings Clause is to protect against those cases where a small group of people who can not protect themselves through the political process are required to bear a disproportionate share of a public burden. *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 871 (1995). This concern is directly relevant here, where public funding is accomplished by taking small amounts of money from a limited number of individuals, whose only common denominator is the fact of having placed money on deposit in connection with a real estate transaction. The chances are small that an organized political response could be mounted by such a divergent group with minimal amounts individually at stake. And any such political protest would likely be unavailing in any event, since the Washington IOLTA program was not even enacted by the legislature but was created by the State Supreme Court acting at the behest of the State Bar. By contrast, a tax to fund legal services imposed in the usual way by the legislature -- instead of by the state Supreme Court -- would be subject to the usual controls of the political process.

concerns might be appropriate.[8] It is simply about seizing property from one group of persons to support a public program. Accordingly, the IOLTA program is at the very core of what is prohibited under the Takings Clause, and no consideration of government interests or other surrounding circumstances could possibly save it. It should therefore be invalidated as a *per se* taking.

This Court has thus far recognized two categories of governmental action that are the practical equivalent of appropriations and thus are *per se* takings: where the government's action involves a permanent physical occupation, *see, e.g., Loretto*, 458 U.S. at 426, and where the government's action denies a land owner all economically beneficial or productive use of the land. *See, e.g., Lucas*, 505 U.S. at 1015. The Court's approach to these cases and its treatment of these two categories is instructive in evaluating this case, where the government's confiscation of Petitioners' property is also readily recognizable as a *per se* taking.

In *Loretto*, this Court held that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." *Loretto*, 458 U.S. at 426. Considering only the character of the government's action, the Court found that the installation of cable wire and

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[8] After Petitioners filed their motion for summary judgment, Washington argued for the first time that the IOLTA program is aimed at protecting depositors from unscrupulous escrow companies who were "stealing" the depositors' earnings credits. *See* LFofW's District Court Opposition Brief at 17-19. The government cannot justify confiscation of property for its own use to avoid the risk that someone else may steal it if the government does not take it first.

equipment on an apartment building roof -- an action which usually enhances the value of the owner's property -- was a taking requiring compensation. *Id.* at 438. In reaching this conclusion, the Court reviewed its previous decisions dealing with governmental occupation of property. *See id.* at 428-431; *see, e.g., St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 98 (1893) (finding taking where telegraph company poles make "permanent and exclusive" use of the space occupied by the poles). The Court found that it had consistently distinguished between "cases involving a permanent physical occupation on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property . . . on the other. A taking has always been found only in the former situation." *Loretto*, 458 U.S. at 428.

Relying on this history, the Court concluded that the permanent physical occupation of the owner's property by the installation of the cable wire and equipment warranted a finding of a *per se* taking. The Court reasoned that such an act does not simply remove one strand from the bundle of property rights but that it "chops right through the bundle, taking a slice of every strand," in that the traditional property rights recognized in a physical thing (i.e., the rights to possess, use, and dispose) are each effectively destroyed by a permanent physical occupation. *Id.* at 435. The Court was able to thus conclude, from the single fact of a permanent physical occupation, that a taking resulted, "without regard to whether the action achieves an important public benefit or has only a minimal impact on the owner." *Id.* at 434-35.

This Court reached a similar, categorical conclusion in deciding the takings question presented in *Lucas*, where,

unlike the case before the Court, the government acted by regulation rather than outright appropriation. The Court noted that it had historically recognized that where the government's regulation "'*denies an owner economically viable use of his land,*'" no evaluation of other factors is necessary in order to conclude that a taking has occurred. *Lucas*, 505 U.S. at 1015-16 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (emphasis added in *Lucas*)). After reviewing its precedent, the Court concluded that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019 (emphasis in original). It noted that "regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm," and may therefore be the "practical equivalen[t]" of "appropriation." *Id.* at 1017-18. Referencing its prior decision in *Loretto*, the Court found similar categorical treatment appropriate. It qualified this conclusion only to the extent of recognizing that pre-existing, common-law doctrines, such as nuisance, might limit the property interest as to which the claimant might be able to assert a taking; one could not assert a taking with regard to rights of use that were denied by background principles of State law.

In sum, this Court's decisions in *Loretto* and *Lucas* effectively truncate the global balancing prescribed by the *ad hoc, Penn Central* analysis, in certain situations that are close to the heart of the Takings prohibition. Petitioners submit that the unusual facts of this case -- where, in order to fund

government programs of general application, the government simply takes property from a few individuals and can offer no rational explanation for singling them out -- presents a proper predicate on which to find a categorical taking.

To be sure, the present case involves the taking of personal property rather than real property. But the rights to personal property are no less valuable than rights in real property. The government may not take randomly selected citizens' cars for public use without a reason. There may be times when it can do so based on some rational justification -- such as reasonable suspicion of illegal activity, unpaid tickets, or for driving while intoxicated. But it may not do so simply to avoid buying a car for the official car pool with state funds. The right to money is no less valuable than any other real or personal property. Indeed, as the universal medium of exchange, its value is most easily determined.

Nor can Respondents justify the IOLTA seizures on the basis of any traditional governmental power. Government has a broad and general power of taxation, and is not constrained by any specific theory of equity from imposing general assessments that are able to survive the political process. This in no way justifies the sort of drive-by taking at issue here, where the assets of a few are grabbed because they come conveniently to hand. Respondents have never claimed – and surely will not claim in this Court – that the IOLTA seizure is a tax.[9] Nor has anyone ever suggested --

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[9] The power to tax "is not within the scope of the judicial power . . ." *South Dakota v. North Carolina*, 192 U.S. 286, 319 (1904). *See also Meriwether v. Garret*, 102 U.S. 472, 515 (1880) ("The levying of

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as indeed they could not -- that it is some sort of user fee. *Cf. United States v. Sperry Corp.*, 493 U.S. 52, 60-64 (1989); *see also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162-163 (1980). This burden falls upon particular property owners based on the happenstance of placing small amounts of money with a real estate or legal professional, and has nothing to do with the property owner's decision to utilize the legal system, or any other service for which a fee might arguably be charged. Nor, obviously, may the seizure be justified under the government's forfeiture power, which this Court has recognized as legitimate in various circumstances and unrelated to the power of eminent domain. *Cf. Bennis v. Michigan*, 516 U.S. 442, 452 (1996).

Nor do Respondents offer any other explanation for why the targets of the IOLTA assessment should be made to bear the burden of funding the bar's legal services program. This case is thus a far cry even from the situation in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where a portion of the Coal Health Benefits Act was found invalid as a taking

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[9](...continued)
taxes is not a judicial act . . . It is a high act of sovereignty, to be performed only by the legislature upon consideration of 'policy, necessity, and the public welfare."). As an enactment of the Washington State Supreme Court at the behest of the Bar Association, IOLTA clearly fails that test of a tax. Further, while legislatures have broad discretion in structuring classifications for tax purposes, such classifications must satisfy rational basis scrutiny. *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992). As an utterly arbitrary and opportunistic assessment, the IOLTA seizures could not survive even that low level of scrutiny.

by a four Justice plurality of this Court,[10] under a *Penn Central* analysis, notwithstanding the efforts of the Act's sponsors to rationalize the monetary assessment there based on the historic role of the obligated parties as members of a coal industry which made moral commitments to miners to ensure lifetime health benefits.

We are presented here with the admittedly unusual -- but we submit far clearer -- situation of a pure appropriation of property, with no regulatory purpose, whose burden is allocated in a manner having no conceivable rational basis, other than the practical ability to reach the property. The fact that payment of money is sometimes required by the government for taxes, for user fees, or on the basis of pre-existing relationships or obligations, does not make outright monetary appropriations anything other than takings -- pure and simple -- where no such justification or regulatory purpose is present. On the present facts, the application of the "clear rule" -- the *per se* rule that an unconstitutional taking has occurred regardless of the use to which the money will be put or any other facts that may be argued -- is entirely appropriate. Indeed, Petitioners submit that two characteristics of the IOLTA program make it a stronger candidate for such treatment than either *Loretto* or *Lucas*.

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[10] Justice Kennedy did not join the plurality's approach to the takings issues because the Act at issue did not "appropriate, transfer or encumber an estate in land . . . or even a bank account or accrued interest." *Eastern Enterprises*, 524 U.S. 498, 540 (Kennedy, J., concurring in judgment and dissenting in part). That objection is inapposite in the context of the IOLTA program, where a "specific property right or interest," *id.* at 541, is taken. It is the property right in the interest earned on deposited funds that this Court recognized in *Phillips*.

First, it is an outright confiscation, not a use limitation or partial invasion of property rights, and thus falls at the very heart of the Taking Clause's original meaning. Second, the invasion of Petitioners' property rights is the very purpose of the government's action, and not an incidental consequence of otherwise legitimate regulatory action. This is simply a funding program. That Respondents have beneficial plans for the money thus seized offers no ground for making some people bear the burden but not others. For these reasons, it is difficult to imagine a case in which a *per se* analysis is more clearly justified.

Following the lead of *Loretto* and *Lucas* in looking for guidance in earlier decisions of this Court on similar facts, there is clear precedent for categorically invalidating outright appropriations of money from a small group of individuals, for no regulatory purpose but simply to fund activities with which they have no special connection. In *Webb's,* this Court held that the government could not confiscate interest from accounts held by court clerks. *Webb's*, 449 U.S. at 164. Because "the exaction is a forced contribution to general government revenues, and it is not reasonably related to the costs of using the courts," *id.* at 163, the Court rejected the attempt to confiscate the interest as "the very kind of thing the Takings Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power." *Id.* at 164. The selection of payors in the IOLTA program is no less arbitrary than that in *Webb's* and the result here should be the same.

The character of the government's action -- opportunistic confiscation of property from a small group of individuals who happen to be within reach of the State Bar,

to fund a program of general application -- is the only fact that needs to be evaluated to determine that the IOLTA program is a taking. This is the "'classic taking' in which the government directly appropriates private property" described by this Court in *Eastern Enterprises*, 524 U.S. at 522, and *Tahoe-Sierra*, 122 S. Ct. at 1480. By outright seizure, the IOLTA program "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. The IOLTA program should be invalidated as a categorical taking.

C. Full Consideration of the *Penn Central* Factors Confirms that the IOLTA Program is a Taking

The IOLTA Program should be invalidated as a *per se* taking precisely because, given the character of the program, no combination of governmental interests or other surrounding facts and circumstances can possibly provide a basis for sustaining it. If that is correct, it follows that an actual consideration of the *Penn Central* factors -- (1) the character of the government action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectations -- must lead to the same result. *See Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-46 (1992).

In this regard, Respondents' principal argument has been to suggest a comparison between the situation of clients in the pre-IOLTA world with the situation under IOLTA, and to argue that in some or perhaps many instances, the claimant would not have realized any interest on his money without IOLTA. Accordingly, they disagree with the discussion above about the character of the governmental action, and

most emphatically argue that the other two *Penn Central* factors -- the economic impact and the effect on reasonable investment-backed expectations -- weigh in favor of sustaining the program. Petitioners have never conceded the underlying factual contention that they could have realized little or no value from their funds in the absence of IOLTA, and do not do so now.[11] Even if Respondents' contentions were true, the IOLTA program would be a taking nonetheless.

First, the proper context for assessing economic impact and the effect on Petitioners' legitimate expectations is the world as it is, not a comparison of that world with a hypothetical pre-IOLTA world in which it is alleged that no interest could be earned. The government does not gain the right to take private property arbitrarily simply because it has facilitated the creation of that property in some way. Respondents' argument to the contrary ultimately rests on the argument that interest on IOLTA accounts is "government created value" to which petitioners can have no claim. That contention was laid to rest in *Phillips*:

[11] Petitioners demonstrated in their motion for summary judgment that after the 1995 expansion of the IOLTA program to cover real estate transactions, Washington banks responded by eliminating or reducing "earnings credits" on escrow accounts; and that escrow companies responded in turn by imposing an "IOLTA fee" on real estate transactions and/or by increasing basic fees charged to their customers. Pet. App. 111a-112a. In particular, Petitioners demonstrated that the bank into which Petitioner Hayes's IOLTA funds were deposited in August 1996 had, prior to August 1996, ceased paying earnings credits on escrow accounts in response to the 1995 expansion of the IOLTA program. JA51-52.

> The value [of IOLTA interest] is created by respondent's funds. The Federal Government, through the structuring of its banking and taxation regulations, imposes costs on this value if private citizens attempt to exercise control over it. Waiver of these costs if the property is remitted to the State hardly constitutes "government-created value."

524 U.S. at 171.[12]

In the real world, where IOLTA exists and where this Court has already determined that the interest accrued on the client's money is the client's property, those clients have an eminently reasonable expectation that it will not be taken by the government arbitrarily. The economic impact of the government action is to deny this expectation, thereby preventing the client from enjoying any benefit from the interest, and transferring that benefit to the government.[13]

[12] This conclusion was unsurprising following the Court's decision in *Webb's*. There, this Court rejected the Florida Supreme Court's reasoning that the interest accrued was not property of the depositor because "the statute 'takes only what it creates.'" *Webb's*, 449 U.S. at 163. "The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Id.* at 164. The Court held that Florida's attempted appropriation of interest generated by funds deposited in a court registry violated the Takings Clause, stating unequivocally that "the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest." *Id.* at 162.

[13] Respondents have attempted in the past, *see* LFofW's Ninth Circuit Brief at 35-36, to support the conclusion of no taking by reference to this Court's case law on the proper measure of

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This conclusion is not undermined by the facts that individuals do not generally place funds with their lawyers or real estate professionals for investment purposes, or that the amount of interest may be small. "[T]he Fifth Amendment draws no distinction between grand larceny and petty theft." *Hodel v. Irving*, 481 U.S. 704, 727 (1987) (Stevens, J. concurring). Indeed, the size of the seizures is part of the program's insidious and objectionable character; small takings may go unnoticed and unopposed. Moreover, in light of the interest-follows-principal rule, Petitioners have a very legitimate expectation that the interest earned on their funds will not be confiscated from them.

Second, even on the mistaken assumptions that relevant expectations and economic impacts should be evaluated by comparison to the hypothetical pre-IOLTA world, and that

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[13](...continued)
compensation, and noting that government need not, in eminent domain proceedings, compensate for enhanced valuations that are the product of the government's own actions. *See United States v. Fuller*, 409 U.S. 488, 492 (1973); *United States v. W.G. Reynolds*, 397 U.S. 14, 21 (1970); *see also Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1948) (measure of compensation is the loss to the property owner, not the "gain to the taker"). Obviously, the issue of whether there is a taking is legally distinct from the question of remedy, and specifically of what compensation, if any, may be due. This Court's decision in *Loretto* makes clear that a *per se* taking by permanent physical occupation may occur through actions that actually enhance the overall value of the property in issue. *Loretto*, 458 U.S. at 437 n.15 (noting that arguments about whether the government's invasion actually enhanced the value of the property are relevant to determining the amount of compensation but not the fact of a taking). Moreover, the *Kimball Laundry* line of decisions has never been invoked to deny *all* relief to those whose property has been confiscated, particularly where (as here) the property has such readily ascertainable value.

IOLTA takes no economic value that would have existed in its absence, the program would still constitute a taking. For owners of funds in IOLTA accounts also have valuable, non-economic rights in their property which must be protected from undue government interference. This Court has long recognized that "property is more than economic value." *Phillips*, 524 U.S. at 170. "[I]t also consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as the right to possess, use and dispose of it.'" *Id.* (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). Here, even if the interest had little or no economic value, "possession, control, and disposition are nonetheless valuable rights that inhere in the property." *Id.*; *see also Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (the right to exclude others is one of the most essential sticks in the bundle of property rights). The IOLTA program's interference with these rights interferes with the owners' legitimate expectations -- based on their ownership of the money -- in a fundamental way.

The IOLTA program constitutes a taking whether viewed as a *per se* taking or analyzed under the *Penn Central* factors. In reaching this conclusion, the Court need not address any of the difficult issues that arise at the margin between legitimate government regulation and exercises of the police power that burden property unduly. IOLTA does not involve governmental regulation of land or conduct of any sort. It is simply a funding program which singles out certain people -- opportunistically and capriciously -- to bear general government burdens. This is precisely what the government is not allowed to do under the Constitution. The laudable purpose to which the funds are put is wholly irrelevant to the decision at hand.

D. The Ninth Circuit's Summary Judgment Ruling that No Compensation was Due is Wrong for Several Reasons

The Ninth Circuit held that "[b]ecause of the way the IOLTA program operates, the compensation due Brown and Hayes for any taking of their property would be nil." Pet. App. 41a. It went on to conclude that, as a result, even if the government had taken property, it had not violated the Fifth Amendment because no compensation was due.

But, of course, as just stated, what the Legal Foundation of Washington has done is to appropriate interest of a certain, specific amount, which undoubtedly belongs to the claimants. The reasoning of the court below depends on the rationale rejected in *Webb's*, 449 U.S. at 163, that a statutory seizure is permissible simply because it "takes only what it creates." The compensation due here is exactly equal to the amount taken, and thus the court below is plainly wrong in saying that compensation due is nil.[14]

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[14] Even if compensation due were determined by comparison of claimants' purely economic situations in the hypothetical pre-IOLTA and the real post-IOLTA worlds, the Ninth Circuit still erred, because there is a genuine issue of material fact concerning that issue. On summary judgment, Petitioners presented evidence of the value of the earnings credits that would have been applied to their real estate transactions absent the IOLTA program. JA 51-52. This evidence was sufficient to raise an issue of fact. The trial court did not reach the question of how much compensation would be due if a taking had been found because it held, contrary to *Phillips*, that Petitioners did not have a property interest in IOLTA-based interest. Pet. App. 94a-96a. Although it recognized that the "no property interest" holding could not stand in light of *Phillips*, *id.* 22a-25a, the Ninth Circuit failed to credit

(continued...)

Even if this were not so, and all that the claimant's lost was a right of less clearly determinate value, here to control the uses to which their property is put, *Phillips*, 524 U.S. at 170, that fact would not mean that no compensation was due, or that the government could simply take such property with impunity. Simply because a particular property interest -- like the right to control one's money, or a letter or family heirloom -- has no readily determinable fair market value, does not mean it has no value, or that no constitutional remedy is available. Such property rights as the right to exclude others from the use of one's money clearly have *some* value, even if that value is not easily quantified. A government that confiscates private property in violation of the Takings Clause should not be heard to argue that the property owner is entitled to no remedy -- neither compensatory damages nor equitable relief -- simply because of the difficulty in measuring the property owner's loss with precision.

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT EQUITABLE RELIEF IS NOT AVAILABLE TO REMEDY TAKINGS CLAUSE VIOLATIONS

The Ninth Circuit held that under no circumstances should Petitioners be awarded injunctive relief on their Takings Clause claims. Rather, "the remedy for the Fifth Amendment violation alleged here is to provide the property owner with just compensation, if a taking has occurred." Pet. App. 19a. Because Petitioners Daugs, Maxwell, and WLF

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[14](...continued)
Petitioners' evidence regarding lost earnings credits. Thus the decision of the Ninth Circuit is wrong for this reason as well.

claimed neither that they had suffered monetary losses nor that they were entitled to an award of damages,[15] the appeals court held that they lacked Article III standing and dismissed their claims on that ground alone. *Id.* 15a-19a.

Thus, the issue of the availability of equitable relief in a Takings Clause claim of this sort is squarely presented to the Court. The appeals court erred in holding that equitable relief is unavailable. The property allegedly seized in violation of the Fifth Amendment is money. Moreover, the Ninth Circuit explicitly found that the State of Washington has not afforded Petitioners an adequate means of pursuing their compensation claims. *Id.* 19a-21a. Under those circumstances, Petitioners are entitled to injunctive relief in order to protect their Fifth Amendment rights.

A. Equitable Relief Is Generally Available in Takings Clause Cases in Which the Appropriated Property Is Money

The property taken from IOLTA depositors by Respondents is money. This Court and other federal courts have held that in such cases, equitable relief is the most appropriate means of remedying any Takings Clause violation.

This issue arose most recently in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Eastern, a former coal operator, challenged the constitutionality of the Coal Industry Retiree

[15] Rather, all three Petitioners sought equitable relief only.

Health Benefit Act of 1992 (the "Coal Act"),[16] arguing *inter alia* that the Coal Act violated its rights under the Takings Clause by requiring Eastern to pay the health care and retirement benefits of certain former coal workers who had never been employed by Eastern. The Court initially addressed a jurisdictional issue: whether Eastern acted properly in filing a declaratory judgment action in district court or whether it should have filed suit initially in the Court of Federal Claims under the Tucker Act.[17] The Court sided with Eastern, finding that the federal district courts have jurisdiction to hear a Takings Clause claim for equitable relief against the federal government, notwithstanding the existence of the Tucker Act, where the property at issue is money. *Id.*, 524 U.S. at 519-22 (plurality opinion).[18]

[16] 26 U.S.C. §§ 9701 *et seq.*

[17] The Tucker Act grants exclusive jurisdiction to the U.S. Court of Federal Claims to render judgment upon any claim against the United States for money damages exceeding $10,000 that is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

[18] None of the other *Eastern Enterprises* opinions took issue with the plurality's analysis of the equitable relief issue. In the absence of any dissenting views, the plurality can reasonably be deemed to have expressed the views of the Court. Moreover, even the United States government, in its *Eastern Enterprises* brief, supported the availability of equitable relief in cases involving the appropriation of money, and the government's analysis of the issue was virtually identical to the one ultimately adopted by the Court. *See* Brief for the Federal Respondent at 38-39 n.30.

The Court explained that in Takings Clause cases involving "a direct transfer of funds" rather than the imposition of burdens on real or tangible personal property, requiring a property owner to submit "a claim for compensation 'would entail an utterly pointless set of activities.'" *Id.* at 521 (quoting *Student Loan Marketing Ass'n v. Riley*, 104 F.3d 397, 401 (D.C. Cir.), *cert. denied,* 522 U.S. 913 (1997)). The Court said that it made little sense to defer resolution of the Takings Clause issue by limiting the property owner to a suit for compensation after his money has been transferred to the government, because the government would end up refunding to successful claimants the very money that it had previously appropriated. *Id.* While *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984), established the general rule that Congress should be presumed to have intended that claims for compensation against the United States be brought in the Court of Federal Claims before any Takings Clause claim could be asserted in district court (in the absence of a statute repealing Tucker Act jurisdiction in specific instances), *Eastern Enterprises* reversed that presumption in cases involving the direct transfer of funds. *Id.* The Court was unwilling to believe that Congress intended to require claimants and the federal government to go through the "utterly pointless set of activities" that Court of Federal Claims filings would entail. *Id.* Rather, Takings Clause claimants such as Eastern are permitted to seek equitable relief in federal district court, in the absence of direct evidence that Congress intended a contrary result. *Id.*

The plurality recognized that no prior Court decision had explicitly endorsed the jurisdictional rule adopted by its decision. The plurality noted, however, that its rule was

consistent with the Court's actions in numerous previous cases in which it had exercised jurisdiction over claims for equitable relief under the Takings Clause:

> [I]n situations analogous to this case, we have assumed the lack of a compensatory remedy and have granted equitable relief for Takings Clause violations without discussing the applicability of the Tucker Act. See, *e.g., Babbitt v. Youpee,* 519 U.S. 234, 243-245 (1997); *Hodel v. Irving*, 481 U.S. 704, 716-718 (1987). Without addressing the basis of this Court's jurisdiction, we have also upheld similar statutory schemes against Takings Clause challenges. See *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.,* 508 U.S. 602, 641-647 (1993); *Connolly,* 475 U.S. at 221-228. "While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, neither should we disregard the implications of an exercise of judicial authority assumed to be proper" in previous cases. *Brown Shoe Co. v. United States,* 370 U.S. 294, 307 (1962) (citations omitted).

Eastern Enterprises, 524 U.S. at 521-22.

The plurality's decision is fully consistent with other cases that have addressed the availability of injunctive relief in a Takings Clause claim against the federal government involving the direct transfer of funds. *See, e.g., Riley,* 104 F.3d at 401; *In re Chateaugay Corp.,* 53 F.3d 478, 492-93 (2d Cir. 1995). *See also Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71 n.15

(1978) (the Declaratory Judgment Act "allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.").

Eastern Enterprises's rationale is equally applicable to Takings Clause claims filed against a State or local government. Requiring IOLTA depositors to wait until after their funds have been appropriated to file suit for just compensation would entail the same "utterly pointless set of activities" decried by *Eastern Enterprises*. Such a process would be particularly pointless in light of the huge volume of IOLTA transactions that take place in Washington State on a daily basis. Individuals such as Petitioners Hayes and Brown -- who engage in real estate transactions on a regular basis -- if limited to suits for compensatory damages, would need to file several suits per year in order to ensure full compensation.[19] Similarly, if the IOLTA program is held to violate the Takings Clause, Washington State could be required on thousands of occasions annually to refund some or all of the very money it had just collected, along with any other damage awards and attorney fees awarded under 42 U.S.C. § 1988. Under those circumstances, *Eastern Enterprises* indicates at the very least that injunctive relief is an appropriate remedy in Takings Clause claims filed in federal district court against State IOLTA programs, in the absence of a strong indication in State law that lawmakers

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[19] The burden imposed on IOLTA claimants by the need to file repeated lawsuits would be exacerbated by the small amount of any single claim. In sharp contrast to the small size of any such individual claims, LFofW's aggregation of the confiscated IOLTA funds raises several million dollars each year, a fact of which Respondents are quite proud.

really contemplated refund-by-refund adjudication of Takings Clause claims.

Moreover, the Court appears to have directed the entry of equitable relief against a State government in the one Takings Clause case most closely analogous to this case. In *Webb's,* the Court held that Florida violated the Takings Clause when it confiscated interest earned on private funds deposited in a court registry. *Webb's,* 449 U.S. at 160-64. Rather than simply ordering the payment of compensation to those whose funds were confiscated, the Court declared unconstitutional the Florida statute that authorized courts to confiscate the interest earned on court registry funds. *Id.* at 164-65. Equitable relief is similarly appropriate in this case.

B. When, as Here, a State Government Appropriates Private Property Yet Fails to Provide an Adequate Mechanism for Obtaining Compensation, the Property Owner Is Entitled to an Injunction Against Future Appropriations

Equitable relief is appropriate in this case for the additional reason that Washington State has not provided an adequate *State court* mechanism by which property owners can obtain compensation for property seized by the State.

The Ninth Circuit expressly rejected Respondents' assertion that Petitioners' Fifth Amendment claims were not ripe because Petitioners had not initially sought compensation in Washington State court under Washington's inverse condemnation procedure. Pet. App. 20a-21a. This Court held in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194 (1985),

that a Takings Clause claim is not ripe for federal court review until a State's procedure for seeking just compensation has been utilized. In rejecting Respondents' assertion, the Ninth Circuit explained that *Williamson County*'s ripeness requirement was subject to several exceptions:

> *Williamson* itself held that a plaintiff may be excused from this requirement if he demonstrates that "the inverse condemnation procedure is unavailable or inadequate." [*Williamson County*, 473 U.S.] at 197. In addition, "an exception exists where the state does not have a reasonable, certain, and adequate provision for obtaining compensation at the time of the taking." *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101-02 (9th Cir. 1998).

Pet. App. 21a. The appeals court concluded that the availability of a suit for compensation in Washington State court was not an adequate remedy because any such suit would be "futile." *Id.* The court stated:

> The final authority on a Washington State inverse condemnation proceeding is the Washington Supreme Court. The Justices of the Washington Supreme Court, as parties to the present action, have filed briefs that argue, not just that the claim is unripe, but that there was no Fifth Amendment violation. The Justices do not point to an available state remedy, nor do they suggest that one is needed. Thus, we conclude that requiring [Petitioners] to seek compensation from the State -- a decision reviewable by the State Supreme Court -- would be futile.

Id.[20]

The appeals court nonetheless *sua sponte* dismissed the claims of Petitioners Daugs, Maxwell, and WLF, on the grounds that they lacked standing. The court concluded that even if the Petitioners could establish a Fifth Amendment violation, the only "appropriate relief" in Takings Clause cases of this type "is to provide the property owner with just compensation." *Id.* 19a.[21] In support of its holding that "prospective injunctive relief is an inappropriate remedy here," *id.* 18a, the court relied exclusively on *Williamson County* and *Monsanto*.

The appeals court's conclusion that declaratory and injunctive relief are disfavored remedies under the Takings Clause is a clear misreading of *Monsanto* and *Williamson County*. Those cases impose no restrictions whatsoever on the types of remedies available to a property owner who prevails on a Takings Clause claim. The Court made clear in both cases that a Takings Clause claim is premature so long as the government entity that has appropriated property for a public purpose has made available to the property owner an adequate procedure for seeking compensation. *Williamson County*, 473 U.S. at 195; *Monsanto*, 467 U.S. at 1016-1020. But the Ninth Circuit has ruled that Washington State has *not*

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[20] Respondents did not file a cross-petition to contest the Ninth Circuit's ripeness determination. Accordingly, the propriety of that determination is not before this Court.

[21] As noted above, the court held that, in light of its conclusion that only compensatory relief was available, Petitioners Daugs, Maxwell, and WLF lacked standing because they did not assert any compensation claims.

provided an adequate procedure whereby Petitioners could seek compensation in State court under State law, and that ruling is not subject to challenge in this Court. In light of that ruling, nothing in either *Monsanto* or *Williamson County* suggests that Petitioners are not entitled to the full panoply of remedies in the event that they establish a Takings Clause violation.

In holding to the contrary, the appeals court apparently concluded that because property owners have available to them a procedure for seeking compensation from *State or local governments* under the Takings Clause in *federal* court, they are foreclosed from seeking equitable relief as well. That conclusion is a clear misreading of this Court's case law. The reason that a property owner often is not permitted to seek equitable relief in a Takings Clause case is that "no constitutional violation occurs" so long as the government that has taken private property itself provides an adequate procedure for obtaining just compensation, and that procedure has not yet been utilized. *Williamson County*, 473 U.S. at 194 n.13. But when a State appropriates private property without providing an adequate State procedure for the property owner to seek just compensation, it has violated the Takings Clause. That violation entitles the property owner to file suit in federal court, and nothing in *Williamson County*, *Monsanto*, or *Eastern Enterprises* suggests that such a plaintiff is restricted in the types of relief he may seek.[22]

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[22] Petitioners do not ask the Court to determine the precise relief to which they are entitled as a remedy for Respondents' violations of the Takings Clause. Petitioners ask only that the appeals court's categorical exclusion of equitable relief be reversed. The district court should be instructed on remand that it is free to consider granting such relief.

The Ninth Circuit's holding to the contrary suggests that States are free to violate the Takings Clause repeatedly with impunity because, after all, property owners can always be made whole by filing a federal court action for compensatory relief.[23] No decision from this Court has so held. States and their officers are expected to conform their conduct to the dictates of the Constitution. Indeed, if a state official were to persist in operating an IOLTA program after a decision holding that the program violated IOLTA depositors' Fifth Amendment rights and ordering compensation, that official could be liable for payment of punitive damages. *See, e.g., Smith v. Wade,* 461 U.S. 30, 55-56 (1983). States are not free to continue practices found to violate the Takings Clause simply because they are willing to pay damages; rather, federal courts are authorized to grant injunctive and declaratory relief to ensure that such practices do not continue.

In sum, the Ninth Circuit erred in holding that the only "remedy for the Fifth Amendment violation alleged here is to provide the property owner with just compensation, if a taking has occurred." Pet. App. 19a.

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[23] Property owners' ability to be made whole in a federal court action against a State government is subject to severe restrictions. Under the Eleventh Amendment, a State generally cannot be sued for compensatory relief in federal court. Petitioners note that Respondents raised an Eleventh Amendment defense in their answer to the amended complaint and have never withdrawn it. JA 39. Thus, fully protecting Petitioners' property rights will almost surely require entry of injunctive and declaratory relief.

CONCLUSION

Petitioners respectfully request that the judgment of the Ninth Circuit be reversed. The case should be remanded with directions that Petitioners' motion for summary judgment be granted and that the district court enter appropriate compensatory and equitable relief for Petitioners.

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